EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

No. 15-1177

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION,
Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

On Petition For Review Of An Order
Of The Consumer Financial Protection Bureau

OPENING EN BANC BRIEF FOR PETITIONERS

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation appeared before the Consumer Financial Protection Bureau ("CFPB") as Respondents. Radian Guaranty Inc., United Guaranty Residential Insurance Company, Mortgage Guaranty Insurance Company, Genworth Mortgage Insurance Corporation, and Republic Mortgage Insurance Company appeared before the CFPB as intervenors.

PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation appear before this Court as Petitioners. The CFPB appears as Respondent.

The following have appeared as amici before this Court: American Financial Services Association, Consumer Bankers Association, Housing Policy Council of the Financial Services Roundtable, Independent Community Bankers of America, Leading Builders of America, Mortgage Bankers Association, National Association of Home Builders, American Escrow Association, American Land Title Association, Real Estate Services Providers Council, Inc., U.S. Mortgage Insurers, Chamber of Commerce of the United States of America, Consumer Mortgage Coalition, National Association of Realtors, State National Bank of Big Spring, the 60 Plus Association, Inc., the Competitive Enterprise Institute, AARP,

Sherrod Brown, Michael Capuano, John Conyers, Jr., Elijah Cummings, Dick Durbin, Keith Ellison, Barney Frank, Alan Grayson, Al Green, Stephen F. Lynch, Carolyn Maloney, Robert Menendez, Jeff Merkley, Brad Miller, Gwen Moore, Nancy Pelosi, Jack Reed, Harry Reid, Brad Sherman, Elizabeth Warren, Maxine Waters, Woodstock Institute, United States Public Interest Research Group Education Fund, Inc., National Council of La Raza, National Consumer Law Center, National Community Reinvestment Coalition, Leadership Conference on Civil and Human Rights, Consumer Federation of America, Center for Responsible Lending, California Reinvestment Coalition, Americans for Financial Reform, American Bankers Association, Credit Union National Association, National Association of Federally-Insured Credit Unions, Real Estate Services Providers Council, ACA International, and the United States.

After the panel's decision, the Attorneys General of Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia, Senator Sherrod Brown, Representative Maxine Waters, Americans for Financial Reform, Maeve Brown, Center for Responsible Lending, Leadership Conference on Civil and Human Rights, Self-Help Credit Union, and United States Public Interest Research Group, Inc. filed motions for leave to intervene, which the panel denied. They then filed motions for

reconsideration by the full Court, which the en banc Court denied. State National Bank of Big Spring, the 60 Plus Association, Inc., and Competitive Enterprise Institute filed a motion to intervene in any en banc proceedings, which the en banc Court denied.

(B) Ruling Under Review

The ruling under review is the final agency action of the CFPB, captioned *In the Matter of PHH Corporation*, Decision of the Director, Docket No. 2014-CFPB-0002, Dkt. 226 (June 4, 2015) (JA1–38), and Final Order, Docket No. 2014-CFPB-0002, Dkt. 227 (June 4, 2015) (JA39–40).

(C) Related Cases

This matter has not previously been before this Court. Counsel is aware of no related cases currently pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

Petitioner PHH Corporation is a publicly traded company (NYSE: PHH). It has no parent company, and no publicly held corporation owns 10% or more of its stock. Petitioners Atrium Insurance Corporation, Atrium Reinsurance Corporation, and PHH Mortgage Corporation are wholly owned subsidiaries of PHH Corporation, and no other company or publicly held corporation owns 10% or more of their stock. Petitioner PHH Home Loans, LLC is owned in part by subsidiaries of PHH Corporation and in part by affiliates of Realogy Holdings Corporation, a publicly traded company (NYSE: RLGY).

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GLOSSARY

ALJ	Administrative Law Judge
Atrium	Petitioners Atrium Insurance Corporation and Atrium Reinsurance Corporation
CFPA	Consumer Financial Protection Act
CFPB	Consumer Financial Protection Bureau
HUD	United States Department of Housing and Urban Development
HUD Letter	Letter from N. Retsinas, Ass't Sec'y for Hous.-Fed. Hous. Comm'r, HUD, to S. Samuels, Countrywide Funding Corp. (Aug. 6, 1997) (JA251–58)
PHH	Petitioners PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans, LLC
RESPA	Real Estate Settlement Procedures Act of 1974

INTRODUCTION

In creating the Consumer Financial Protection Bureau ("CFPB"), Congress placed massive, unchecked federal power in the hands of a single, unaccountable Director. The CFPB is structured so that the Director alone rules over large swaths of the field of consumer finance, subject to virtually no restraints from the representative branches: For example, Congress both strictly limited the President's ability to remove the Director and surrendered its own power of the purse, allowing the Director to set his own budget and demand funds as he sees fit. Thus, the Director runs a parallel government unto himself. He need not answer to Congress or the President. That structure cannot be reconciled with the Constitution's dual promises of democratic government and separated powers.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court reaffirmed that the Constitution generally forbids limiting the President's ability to hold executive officers accountable by removing them from office in his discretion. 561 U.S. 477, 483 (2010). The Court struck down an agency's "novel structure" because it conferred unprecedented insulation from constitutional accountability. *Id.* at 496.

Here, too, Congress created an agency with a structure unlike any that the Supreme Court has ever condoned. In contrast to the multi-member commission in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the CFPB is headed

by a single Director. He serves a five-year term that cannot be cut short if the President wants a replacement and that can be extended *indefinitely* if the Senate does not confirm a replacement. The result hamstrings, and potentially eliminates altogether, the President's influence over this powerful agency. The single-Director structure also exacerbates the CFPB's intrusion on individual liberty by removing the internal checks and balances present in multi-member commissions. The self-funding budget authority removes the *external* check that Congress ordinarily exercises through the power of the purse. And unlike the independent counsel in *Morrison v. Olson*, 487 U.S. 654 (1988), the Director's jurisdiction is broad, his tenure is potentially unlimited, and he has vast policymaking and adjudicative authority.

In light of the many constitutional problems that plague the CFPB's structure, the appropriate remedy is to strike down the CFPB in its entirety. Severance of the CFPB Director's removal restrictions is not an adequate or appropriate remedy because it would solve only one of the CFPB's multiple structural problems while creating a new agency structure that Congress likely did not intend. Moreover, unless this Court vacates the CFPB's Order on some other ground *without* any remand, the separation-of-powers question cannot be avoided: There can be no remand to an unconstitutional agency.

The Director's multiple and grave legal errors in this case are exactly what one would expect from an unaccountable agency headed by a single officer wielding vast yet unrestrained government power. The Director invented a new interpretation of the Real Estate Settlement Procedures Act ("RESPA") that prohibits certain mortgage insurance arrangements that Congress unambiguously chose to allow. He determined that CFPB administrative enforcement actions are subject to no limitations period, despite RESPA's express three-year time bar. And he unilaterally imposed $109 million in *retroactive liability* on PHH for conduct that the CFPB's predecessor, the Department of Housing and Urban Development ("HUD"), had told the real-estate industry—repeatedly, over a period of decades—was lawful.

The panel's unanimous rulings on these statutory issues were plainly correct, and there is no basis to revisit them now. This Court instructed the parties to treat the "panel's ruling on the statutory issues in this case" as "given," Order at 2 (Feb. 16, 2017), Doc. 166181, and the United States did not support rehearing these statutory issues. Regardless of how it decides the issues on which it sought new briefing, the Court should reinstate the panel's statutory holdings and restore much-needed certainty to the industry.

Similarly, the panel was clearly correct in concluding that the CFPB's attempt to apply its newly-minted interpretation of RESPA to PHH, retroactively,

failed "Rule of Law 101." Panel Op. 86–89. Even the CFPB has conceded that the panel's due-process holding does not independently merit en banc review.

For all these reasons and more, this Court should vacate the Director's Order. To provide Petitioners full relief, the Court should not permit any remand that would allow the CFPB to resume these invalid proceedings.

STATEMENT OF JURISDICTION

The Director's Decision and Order, *In the Matter of PHH Corporation*, Docket No. 2014-CFPB-0002, Dkts. 226, 227, JA1–38, JA39–40, were issued on June 4, 2015. Petitioners filed a timely petition for review on June 19, 2015. This Court has jurisdiction pursuant to 12 U.S.C. § 5563(b)(4).

STATEMENT OF ISSUES

This Court ordered the parties to address the following issues:

1. Whether the CFPB's structure violates the Constitution and, if so, whether the proper remedy is to sever the for-cause removal provision.

2. Whether, given the panel's ruling on the statutory issues, this Court may avoid deciding whether the CFPB's structure is unconstitutional.

3. What the appropriate disposition is here if the Court holds that the administrative law judge in *Lucia v. SEC*, No. 15-1345, was an inferior officer.

At the panel stage, the following additional issues were before the Court:

4. Whether the Director's interpretation of Section 8 of RESPA is contrary to the statute, arbitrary, capricious, or otherwise not in accordance with law.

5. Whether the Director impermissibly applied his new interpretations of RESPA retroactively to impose liability for conduct that was expressly permitted by prior agency pronouncements.

6. Whether the injunctions and $109 million "disgorgement" award are overbroad, vague, unduly burdensome, unlawful, unsupported by evidentiary foundation, or otherwise invalid.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS AT ISSUE

Pertinent constitutional provisions, statutes, regulations, and administrative materials are reproduced in the Addendum.

STATEMENT OF THE CASE

A. The Consumer Financial Protection Bureau

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"). Title X, known as the "Consumer Financial Protection Act" ("CFPA"), created a new agency: the CFPB. Congress transferred to the CFPB the authority to enforce 18 preexisting consumer-protection laws previously administered by seven different agencies. 12 U.S.C. § 5481(12). In addition, Dodd-Frank gave the

CFPB new authority, including broad powers to regulate and prosecute acts it considers "unfair, deceptive, or abusive." *Id.* § 5531(a). The federal consumer-protection statutes under the CFPB's purview cover "everything from home finance to student loans to credit cards to banking practices." Panel Op. 6.

The CFPB is "considered an Executive agency," 12 U.S.C. § 5491(a), and is headed by a single Director who serves a five-year term that may extend indefinitely "until a successor has been appointed and qualified," *id.* § 5491(c)(2). Under the CFPA, the President may remove the Director only "for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

The CFPB funds itself entirely outside the appropriations process. The Director can claim up to 12% of the Federal Reserve System's funds, 12 U.S.C. § 5497(a)(2)(A)(iii), amounting to as much as $632 million in fiscal year 2016.[1] Neither of Congress's Committees on Appropriations may review the Director's self-funding decisions. *Id.* § 5497(a)(2)(C). Nor is the Director required to "obtain the consent or approval of the Director of the Office of Management and Budget," which lacks "any jurisdiction or oversight over the affairs or operations of the Bureau." *Id.* § 5497(a)(4)(E). By statute, the CFPB also has "[a]utonomy" from the Board of Governors. *Id.* § 5492(c).

[1] Financial Report of the CFPB, Fiscal Year 2016, at 61 (Nov. 15, 2016), https://tinyurl.com/z2s7m28.

B. Mortgage Reinsurance And The Real Estate Settlement Procedures Act

One of the statutes that Dodd-Frank places under the CFPB's aegis is RESPA, 12 U.S.C. §§ 2601–2617. RESPA imposes civil and criminal liability for paying for referrals incident to real-estate settlement services, *id.* § 2607(a), (d)(1)–(2). Section 8(c) of RESPA, however, makes explicit that certain conduct is lawful: "Nothing in this section shall be construed as prohibiting" any "payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed[.]" *Id.* § 2607(c)(2). HUD, which originally administered RESPA, interpreted Section 8(c) in "Regulation X" to "permi[t]" payments covered by Section 8(c)(2) unless the payment "bears no reasonable relationship to the market value of the goods or services provided." 24 C.F.R. § 3500.14(g) (2011).

RESPA governs real-estate settlement-service practices, such as the provision of mortgage insurance on a home loan. 12 C.F.R. § 1024.2. Mortgage insurance protects a lender against a borrower's default. JA3. Although given a choice, borrowers typically rely on lenders to recommend a mortgage insurer. *Ibid.*

Historically, many insurers have obtained *re*insurance, which protects the mortgage insurers themselves by shifting some of the risk of insuring the mortgages to a reinsurer. JA3. In exchange, the mortgage insurer pays a portion

of the borrower's monthly premiums to the reinsurer. *Ibid.* Rather than insuring against default on particular loans, a mortgage reinsurer insures pools of loans originated over a given "book year." *Ibid*.

During the period at issue here, all mortgage reinsurers were "affiliated" or "captive" reinsurers, meaning that they provided reinsurance only for loans originated by a related lender. JA13. Affiliated-reinsurance relationships are common and well-accepted both inside and outside the mortgage industry. JA110; JA271–75. Among other benefits, affiliated reinsurance rewards higher-quality loans by ensuring that the originator of a mortgage loan continues to have "skin in the game" even after it has sold the loan. JA316.

In 1997, the Federal Housing Commissioner, exercising the HUD Secretary's delegated authority, 54 Fed. Reg. 22,033, 22,035 (May 22, 1989), explained that it was the "Department's view" that affiliated-reinsurance arrangements are "permissible" under Section 8(c)'s "exemption" when "the payments to the reinsurer: (1) are for reinsurance services 'actually furnished or for services performed' and (2) are *bona fide* compensation that does not exceed the value of such services." JA253 ("HUD Letter"). In 2004, HUD reiterated that the "1997 guidance" remains "useful" in determining the "legality of captive mortgage reinsurance programs." JA259. Other federal agencies encouraged industry participants to rely on the HUD Letter, too. *See* Office of Thrift Supervision,

Proposed Mortgage Guaranty Reinsurance Activities Through Reciprocal Insurer, 1999 WL 413838, at *2 n.20 (Mar. 11, 1999) ("[The 1997 HUD Letter] will assist you in meeting your responsibility to comply with RESPA.").

HUD frequently employed this same two-part test as the governing standard under Section 8 in other contexts. *See*, *e.g.*, Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 Fed. Reg. 36,271, 36,272 (June 25, 2010); Title Insurance Practices in Florida, 61 Fed. Reg. 49,398, 49,399 (Sept. 19, 1996); Rental of Office Space, Lock-outs, and Retaliation, 61 Fed. Reg. 29,264, 29,265 (June 7, 1996). In the context of a lending practice known as yield-spread premiums, for example, Congress directed HUD to "clarify its position on lender payments to mortgage brokers," pointedly observing that "Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations of" Section 8(a). H.R. Rep. No. 105-769, at 260 (1998) (Conf. Rep.). HUD responded by reaffirming that Section 8(c)(2) makes lawful settlement services that satisfy the two-part analysis. Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10,080, 10,085–86 (Mar. 1, 1999).

When Dodd-Frank transferred HUD's RESPA enforcement mandate to the CFPB, the CFPB announced that "the official commentary, guidance, and policy statements issued prior to July 21, 2011" would "be applied by the CFPB pending

further CFPB action." Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43,569, 43,570 (July 21, 2011). The CFPB codified Regulation X in its own regulations, 12 C.F.R. pt. 1024, making no substantive change to the provisions relevant here, *id.* § 1024.14(g)(2).

C. Petitioners' Affiliated-Reinsurance Relationships

During the relevant period, PHH originated, purchased, and sold home mortgage loans. JA2–3. In 1994, PHH created Atrium Insurance Corporation to provide reinsurance services to mortgage insurers for mortgages originated by PHH or underwritten to its guidelines. JA2. PHH disclosed its affiliated-reinsurance arrangements in writing to borrowers, giving them the choice to secure a different mortgage insurer or to request that the policy not be reinsured. JA266, JA332; Panel Op. 72 n.21. Borrowers were not assessed any additional fees, nor did they pay a higher rate, because of the reinsurance. JA3.

PHH used a variety of mortgage-insurance providers, only some of which entered into reinsurance agreements with Atrium. JA319. Atrium paid substantial reinsurance claims filed by several of those entities. For example, it paid out more than $156 million in reinsurance claims to two insurers. JA69. As of January 1, 2010, Atrium had ceased reinsuring any new loans, and, as of May 2013, the last of Atrium's reinsurance agreements had been terminated. JA134–41.

D. Proceedings Before The CFPB

On January 29, 2014, the CFPB filed a Notice of Charges against Petitioners, alleging violations of Section 8 of RESPA. JA41. The Notice of Charges applied the legal standard articulated in the HUD Letter, contending that the reinsurance premiums "(a) were not for services actually furnished or performed, or (b) grossly exceeded the value of any such services." JA57.

1. The ALJ's Decision

To adjudicate this matter, the CFPB borrowed an Administrative Law Judge ("ALJ") from the Securities and Exchange Commission ("SEC"). JA75.

On May 22, 2014, the ALJ applied HUD's "regulations and interpretive guidance" and found that RESPA permits affiliated reinsurance if "reinsurance services [are] actually furnished" in exchange for "bona fide compensation that does not exceed the value of such services." JA85–86. The ALJ found that PHH provided actual reinsurance services; however, he put the burden on PHH to prove that the compensation was reasonable. JA181.

The ALJ determined that the CFPB could not pursue any alleged violations that HUD could not have challenged before the CFPB's creation on July 21, 2011. He therefore barred any claims arising before July 21, 2008, under RESPA's three-year statute of limitations. JA90. Consequently, the ALJ's analysis was limited to book years that included loans that closed on or after that date. *See* JA194–99.

For the 2009 book year for United Guaranty Residential Insurance Company, the CFPB failed to put forward any evidence that the reinsurance premiums bore "no reasonable relationship to the market value" of the reinsurance services provided. 24 C.F.R. § 3500.14(g) (2011).[2]

On November 25, 2014, the ALJ issued a Recommended Decision concluding that Petitioners violated Section 8 because, under HUD's two-part test, Petitioners had not convinced him that the compensation did not exceed the value of the services provided. The ALJ recommended injunctions and disgorgement of $6,442,399, an amount the ALJ found to represent all premiums paid to Atrium by two mortgage insurers for the book years that included loans closed after July 21, 2008. JA208.

2. The Director's Decision

Petitioners and the CFPB's Enforcement Counsel cross-appealed to the Director. JA2. On June 4, 2015, the Director upheld the ALJ—and went even further. JA33–37.

The Director first expressly "reject[ed]" the HUD Letter, holding that Section 8(c)(2) is not a "substantive exemption" from liability. JA16–17. The

[2] Under RESPA's three-year time bar, *see* Panel Op. 100, 2009 is the only book year that includes loans that closed within the limitations period. JA319–20 n.15.

Director then held that RESPA's three-year limitations period does not apply to administrative enforcement actions. JA10–12. While the ALJ concluded that a Section 8 violation occurs at the moment each loan closes, the Director determined that each monthly *payment* for mortgage insurance after closing—despite the absence of any "referral" tied to that payment—was a separate violation. JA22. This allowed him to reach back to earlier book years for loans that had closed before July 21, 2008, so long as monthly payments occurred later. The Director thereby increased the ALJ's disgorgement award from $6.4 million to over $109 million. JA40.

E. Proceedings Before This Court

Petitioners timely sought review in this Court and a stay of the Director's Order. A special panel (Judges Henderson, Millett, and Wilkins) granted the stay, finding that Petitioners "satisfied the stringent requirements" for such relief. Order (Aug. 3, 2015), Doc. 1565883.

On October 11, 2016, a panel of this Court vacated the Director's Order. The panel concluded that it must reach the separation-of-powers question to adjudicate PHH's broadest claim for relief, because there could be no remand on the statutory issues to an unlawfully constituted agency. Panel Op. 10–11 n.1. The Court held that the CFPB's structure as a single-Director independent agency violated Article II of the Constitution. *Id.* at 17–69. Because the panel concluded

that the constitutional violation could be remedied by severing the Director's for-cause removal provision, it proceeded to review the substance of the Director's Order. The panel concluded that Section 8(c)(2) unambiguously "permits captive reinsurance arrangements where mortgage insurers pay no more than reasonable market value for the reinsurance," and remanded for further proceedings under the correct interpretation of RESPA. *Id.* at 73–79.

The panel further held that the CFPB violated the Due Process Clause by applying its new Section 8 interpretation retroactively against Petitioners despite decades of prior agency pronouncements adopting a contrary interpretation. Panel Op. 79–89. The panel's opinion made clear that "the CFPB has the burden of proving [Section 8 violations] by a preponderance of the evidence," *id.* at 89–90 n.27, and that any disgorgement award is limited to "the amount that was paid above reasonable market value." *Id.* at 79 n.24. Finally, the panel held that the CFPB's administrative enforcement proceedings are subject to RESPA's statute of limitations. *Id.* at 90–100.

The CFPB petitioned for rehearing en banc on two questions: whether its structure violates the Constitution and whether the panel correctly construed Section 8 of RESPA. The CFPB conceded that the panel's Due Process Clause holding did not independently merit review, Pet. 14–15, and did not mention the panel's holdings on burden of proof, statute of limitations, or the proper method for

calculating disgorgement. The United States supported the CFPB's petition for the limited purpose of rehearing the panel's *analysis* of the separation-of-powers question, but did not challenge the panel's decision on that (or any other) score.

STANDING

Petitioners have Article III standing because they are the objects of the Order on review. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). Petitioners have statutory standing because each participated in, and was a party to, the agency proceedings. *See* 12 U.S.C. § 5563(b)(4).

SUMMARY OF ARGUMENT

I. The CFPB's unprecedented independence from the elected branches of government violates the separation of powers.

A. The Constitution divides the federal government's limited powers among three separate branches. Under Article II, the President alone heads the Executive Branch, and therefore Congress generally cannot limit his ability to remove an executive officer. Contrary to these first principles, the CFPB vests enormous Legislative, Executive, and Judicial power in the hands of a single Director whom the President may not remove except for cause.

The Supreme Court has recognized only two narrow exceptions allowing Congress to limit the President's removal power, and neither applies here. Unlike most independent agencies with a multi-member commission structure, the CFPB

is headed by a single Director. And unlike the independent-counsel statute in *Morrison v. Olson*, the Director possesses broad regulatory power and lengthy tenure.

The CFPB's constitutional infirmities extend far beyond limiting the President's removal power. Congress abdicated its own ability to hold the Director accountable through the power of the purse. Numerous other features of the CFPA further amplify the Director's lack of democratic accountability. There is no historical analogue for the accumulation of so much power in the hands of one constitutionally unaccountable person. For all these reasons, the CFPB is unconstitutionally structured.

B. Because of the CFPB's many constitutional infirmities, the proper remedy is to strike down the agency in its entirety. Indeed, the for-cause removal provision is not severable from the rest of the provisions establishing the CFPB because severance would create a new agency unrecognizable to the Congress that passed Dodd-Frank. Congress never would have surrendered its own influence over the CFPB while dramatically increasing the President's power over statutes previously administered by independent agencies. Dodd-Frank's severability clause preserves the vast majority of the statute, but it cannot save the provisions creating the CFPB.

II. This Court cannot avoid the separation-of-powers issues in this case simply by adopting the panel's statutory holdings and remanding to the CFPB, because this Court cannot remand a case to an unconstitutional agency. Moreover, the Director is time-barred from ratifying the prior decision to bring a Notice of Charges against PHH. And a remand without resolution of the separation-of-powers issues would be futile because this Court most likely would just be presented with them again in a future petition for review. Only by vacating the CFPB's order *without* remand, so that the CFPB would not be free to resume proceedings against PHH, may this Court avoid deciding the separation-of-powers issues.

III. If the Court holds in *Lucia v. SEC* that the ALJ in that case was improperly appointed, then the ALJ's proceedings in this case were also invalid and the Director's Order would need to be vacated. But PHH would still be entitled to a decision on all the other issues in this case, because the Court cannot provide PHH full relief without explicitly refusing to remand and forbidding the CFPB from resuming these proceedings.

IV. Regardless of how it resolves the other issues in this case, the full Court should not revisit the panel's unanimous and plainly correct ruling as to the interpretation of RESPA—a ruling that this Court's en banc order assumes as "given." Section 8(c)(2) unambiguously permits reasonable payments for services

actually provided. The Director's contrary determination, that Section 8(c) is irrelevant to PHH's alleged violation, violates the statute's command that "nothing in [Section 8] shall be construed to prohibit" conduct blessed under that provision. The panel's ruling was fully consistent with the CFPB's own regulations and policy statements, as well as caselaw from other circuits.

The panel also correctly determined that RESPA's three-year limitations period applies to this matter, as it does to all enforcement proceedings, including those before the Director's in-house court. The CFPB's anomalous position that the time bar attaches to *judicial* actions but not to *administrative* actions, when it is the CFPB that gets to choose which enforcement route to employ, finds no support in the law.

V. Finally, the Director's Order violates the bedrock principle that the government must provide fair notice of what the law prohibits. The Director imposed more than a hundred million dollars in retroactive liability based on interpretations of Section 8 that were in direct conflict with the government's long-standing interpretation of Section 8(c)(2)—including in the specific context of affiliated reinsurance. The Due Process Clause forbids that result.

ARGUMENT

Dodd-Frank's unconstitutional CFPA provisions place sweeping and unprecedented Legislative, Executive, and Judicial power "in the same hands," a

dangerous anomaly that the Framers recognized as "the very definition of tyranny." *The Federalist No. 47*, at 301 (Madison) (Clinton Rossiter ed., 1961). Worse, the Director is constitutionally unaccountable and unfettered by meaningful checks and balances. The Constitution forbids such an entity.[3]

I. The CFPB Is Unconstitutionally Structured And Must Be Invalidated.

A. The CFPB Has Multiple Unconstitutional Features.

1. The Constitution does not create a government of undifferentiated powers to be wielded by any officers of Congress's choosing. Rather, the Constitution grants the federal government limited powers divided into "three defined categories, Legislative, Executive, and Judicial," *INS v. Chadha*, 462 U.S. 919, 951 (1983), which are, in turn, assigned to three "separate and distinct" Branches of government. *The Federalist No. 51*, at 355 (Madison). "All legislative Powers herein granted," including control over "Appropriations," are assigned exclusively to the multi-member Congress. U.S. Const. art. I, §§ 1; 9, cl. 7. "The judicial Power" to decide "Cases" and "Controversies" is assigned to Article III courts. *Id.* art. III, § 1. "The executive Power" is "vested in a

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[3] This Court reviews all "pure question[s] of law" here "de novo." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015); *see also United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987).

President," who must "take Care that the Laws be faithfully executed." *Id.* art. II, §§ 1, 3.

The Framers kept each Branch's powers separate from the others "in all cases in which they were not expressly blended," thereby imposing checks and balances. *Myers v. United States*, 272 U.S. 52, 116 (1926). As the "Framers recognized," these "structural protections against abuse of power were critical to preserving liberty." *Free Enter. Fund v. Pub. Co. Account. Oversight Bd.*, 561 U.S. 477, 501 (2010).

Separated powers are also essential for maintaining accountability to the people. The Framers "rejected" the "idea of a 'plural executive,'" instead "placing power in one person, in order to gain the advantages of accountability fixed on a single source." *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 130 (D.C. Cir. 2005) (internal quotation marks omitted). Whereas dividing the executive authority "tends to conceal faults, and destroy responsibility," a single executive would be "dependen[t] on the People." *The Federalist No. 70*, at 424, 427 (Hamilton). "[U]nity in the Executive," the Framers knew, "would be the best safeguard against tyranny." 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 66 (1911) (James Wilson). The Framers "consciously decid[ed] to vest Executive authority in one person rather than several" to "focus,

rather than to spread, Executive responsibility thereby facilitating accountability." *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

Although the President alone is tasked with "tak[ing] Care that the Laws be faithfully executed," he cannot do so unless he is able to "oversee the faithfulness of the officers who execute them—by removal, if necessary." *Free Enter. Fund*, 561 U.S. at 484. This principle was established in one of the First Congress's earliest and most extensive debates, which concerned what would eventually become the Secretary of State. Congress struck the phrase "removable by the President" from the proposed legislation, lest the inclusion of that provision suggest that Congress had *any* authority to limit the President's removal power. *Myers*, 272 U.S. at 113. This "Decision of 1789," which provides "contemporaneous and weighty evidence" of the Constitution's meaning, *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (citation omitted), affirmed that the removal "power was vested in the [P]resident alone," *Parson v. United States*, 167 U.S. 324, 331 (1897). As Madison noted in the midst of that debate, "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 481–82 (1789).

More than a century later, "[t]he landmark case of *Myers*" reaffirmed that the Constitution's grant of "executive power included a power to oversee executive officers through removal." *Free Enter. Fund*, 561 U.S. at 492. The President must

be able to "supervise and guide" the actions of the officers who execute federal laws, and therefore "must have the power to remove [those officers] without delay." *Myers*, 272 U.S. at 134–35.

The Supreme Court has since recognized only two limited exceptions to "the traditional default rule" that "removal is incident to the power of appointment." *Free Enter. Fund*, 561 U.S. at 509: (1) a multi-member "body of experts," *see Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935), and (2) certain inferior officers with limited tenure and a narrow scope of powers, *see Morrison v. Olson*, 487 U.S. 654, 671–73, 695–97 (1988).[4] As *Free Enterprise Fund* makes clear, when a court is asked "to consider a new situation not yet encountered by the [Supreme] Court," there must be special mitigating "circumstances" to justify "restrict[ing the President] in his ability to remove" an officer. 561 U.S. at 483–84. If the "new situation" does not narrowly constrain the agency's responsibilities or otherwise check its authority, and if the agency's structure insulates it from

[4] The continued viability of *Humphrey's Executor* and *Morrison* after *Free Enterprise Fund* has been questioned. *See*, *e.g.*, *In re Aiken Cty.*, 645 F.3d 428, 444, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring). *Free Enterprise Fund* makes clear that, at minimum, *Humphrey's Executor* and *Morrison* should be read narrowly and not extended. Further, Petitioners respectfully preserve the argument that the Supreme Court should revisit and overturn either or both *Humphrey's Executor* and the relevant portion of *Morrison* as inconsistent with the separation-of-powers principle. *See* Panel Op. 59–60 n.15.

constitutional "accountability," *id.* at 497–98, 513–14, then the restriction on the President's removal authority is unconstitutional.

2. The CFPB is precisely such a "new situation." The CFPB is headed not by a multi-member commission but by a single, autonomous Director. Thus, unlike the Federal Trade Commission ("FTC"), the Director is not "called upon to exercise the trained judgment of *a body of experts* 'appointed by law and informed by experience.'" *Humphrey's Ex'r*, 295 U.S. at 624 (citation omitted; emphasis added). Historically, "independent" agencies almost exclusively have been headed not by a single individual but by multi-member commissions, forming a "[l]ong settled and established practice" which is given "great weight" in constitutional interpretation. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *see* Panel Op. 36–42. Moreover, multi-member commissions contain their own internal checks to avoid arbitrary decisionmaking. *See* Panel Op. 44–49. This diffusion of power helps to ensure that each governmental division "will be controlled by itself." *The Federalist No. 51*, at 291 (Madison). Indeed, "[a]gency independence" itself is, in part, "a function of" the "multimember bipartisan board" composition. *Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting).[5]

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[5] The few potential analogues to the CFPB's structure are mere "anomalies," *Noel Canning*, 134 S. Ct. at 2567, that do not come close to establishing the CFPB's constitutionality. The Social Security Administration's current structure is

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Unlike the independent counsel in *Morrison*, the Director does not have "limited jurisdiction and tenure" or "lac[k] policymaking or significant administrative authority." 487 U.S. at 691. To the contrary, the Director has lengthy tenure, and wields sweeping enforcement authority over "American business, American consumers, and the overall U.S. economy." Panel Op. 6. "Perhaps the most telling indication of the severe constitutional problem" with the CFPB's structure "is the lack of historical precedent for this entity." *Free Enter. Fund*, 561 U.S. at 505 (internal quotation marks omitted).

The CFPA's problematic features do not end there. The statute also limits the President's ability to control the CFPB's communications with Congress, 12 U.S.C. § 5492(c)(4), and precludes the President from overruling the Director's interpretation of a consumer-protection statute where that law is administered by both the Bureau and another agency. *Id.* § 5512(b)(4). And the Director has

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relatively recent, and that agency has no enforcement authority; yet President Clinton still recognized its constitutional problems. Panel Op. 30–31. Similarly, the Office of Special Counsel is relatively recent and has narrow jurisdiction, and Presidents Carter and Reagan contested its constitutionality. Panel. Op. 31. The Federal Housing Finance Agency, created in 2008, is almost as recent as the CFPB, and covers only quasi-governmental entities. Panel Op. 29, 33; *see* 12 U.S.C. § 4511(b). The Comptroller of the Currency is removable at will for any "reasons" "communicated" "to the Senate," without limitation. 12 U.S.C. § 2; *see* Panel Op. 33–34 n.6; Post Employment Restriction of 12 U.S.C. § 1812(e), 25 Op. O.L.C. 184–87 (2001) (assuming the Comptroller serves at the President's pleasure).

extraordinarily sweeping authority to hire, fire, and compensate CFPB employees, *id*. § 5493(a)(1), (2), to whom he may unilaterally delegate his immense powers. *Id.* § 5492(b).

The Director exercises all of this power over a lengthy term of five years, which can be extended indefinitely if the Senate does not confirm a successor. *See* 12 U.S.C. § 5491(c)(1)–(2). Thus, a President could serve an entire four-year term powerless even to remove the CFPB's leader or name a successor, and, given the other barriers to presidential control, he would thus be unable even to influence the agency in its execution of a wide body of federal law. *See* Panel Op. 58. In contrast, a President in one term will always be able to nominate multiple FTC Commissioners (owing to their staggered terms) and can unilaterally designate the FTC's Chair. 15 U.S.C. § 41. The President is left no way to "faithfully execute[]" the 19 federal consumer-finance statutes; they are instead executed exclusively by the Director.

Thus, within his vast realm, the Director wields sweeping Legislative, Executive, and Judicial powers—including the power to issue far-reaching regulations, independently litigate in the government's name, and punish businesses and individuals in his in-house court. *See* 12 U.S.C. §§ 5512 (rulemaking authority for consumer finance law); 5531(b) (rulemaking authority for "unfair, deceptive, or abusive acts or practices"); 5562 (investigative authority);

5563 (adjudicative authority); 5564 (independent litigation and enforcement authority); 5565 (power to impose sweeping legal and equitable relief and penalties). The Director has vast power and broad jurisdiction over nearly every person that offers a consumer-financial product or service. *Id.* §§ 5481(6), (26); 5536(a). Never before has so much federal power been concentrated in the hands of one individual so thoroughly shielded from constitutional accountability. As the panel recognized, "other than the President, the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power." Panel Op. 25. The Director sits atop his own parallel government with broad dominion over consumer finance but without constitutional accountability.

3. In *Humphrey's Executor*, the Supreme Court allowed diminished Presidential control in exchange for increased congressional control, as the FTC was to act "quasi legislatively" and "in aid of legislative power . . . as a legislative agency." 561 U.S. at 628. Here, by contrast, Congress eliminated all other important checks on the Director by abdicating its *own* core responsibilities over the CFPB. The Director has sole authority to set the CFPB's budget and to demand more than half a billion dollars from the Federal Reserve System's operating expenses, 12 U.S.C. § 5497(a)(2)(A)—a demand *exempt* from "review by [Congress's] Committees on Appropriations," *id.* § 5497(a)(2)(C).

Under the Constitution, however, Congress has the exclusive power of the purse. *See* U.S. Const. art. I, § 7, cl. 1 (Origination Clause), § 8, cl. 1 (Taxing and Spending Clause), § 9, cl. 7 (Appropriations Clause). The Constitution instructs that "*No Money* shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7 (emphasis added). Congress's "'power over the purse'" is "'the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people'" and provides a "bulwark" that is "particularly important as a restraint on Executive Branch officers." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (quoting *The Federalist No. 58*, at 359 (Madison)). Indeed, "[t]he Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist" executive power. *Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2010), *aff'd*, 134 S. Ct. 2550.

The Director's ability to requisition his own funds further limits his accountability to the President too, since the Director need not ask the President for help negotiating appropriations from Congress. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 42–43 (2010). Indeed, the CFPB is uniquely insulated from budgetary oversight because it is protected by a dual-layer of exemption from the Appropriations

power. *Cf. Free Enter. Fund*, 561 U.S. at 495. The CFPB demands funds from the Federal Reserve, which itself is funded not by appropriations but by assessing fees on Federal Reserve banks. 12 U.S.C. § 243. This added layer of insulation further shields the CFPB from any public accountability.

There are, accordingly, no mitigating "circumstances" here that could justify encroaching on the President's removal power. *Free Enter. Fund*, 561 U.S. at 483–84. Quite the opposite, the CFPB combines vast authority for the Director with unprecedented insulation. *See id.* at 498 (striking down removal limitations because "the public c[ould not] 'determine on whom the blame . . . ought really to fall'") (quoting *The Federalist No. 70*, at 428 (Hamilton)).

This Court should not examine these structural defects in isolation. "[J]ust because two [or more] structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute." *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015). Rather, the constitutionality of agency "independence" must be examined holistically, and "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

The CFPA creates an agency with vast powers and expands the Director's independence by exempting his decisions from essential constitutional checks and balances. *Cf. Ralpho v. Bell*, 569 F.2d 607, 620 (D.C. Cir. 1977) ("[It is] daring to suggest that Congress, though subject to the checks and balances of the Constitution, may create a subordinate body free from those constraints."). While the Supreme Court has "previously upheld limited restrictions" on particular checks and balances, the *combination* of elements of the CFPB's "novel structure does not merely add to the [agency's] independence, but transforms it." *Free Enter. Fund*, 561 U.S. at 495, 496. The public must be able to "ensure that those who wield[]" power are "accountable to political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). The CFPB's unprecedented insulation from *all* democratic checks and accountability cannot be reconciled with that constitutional mandate.

B. The Proper Remedy Is To Strike Down The CFPB In Its Entirety.

The panel's limited remedy of severing only the Director's removal restrictions, Panel Op. 10, does not address the CFPB's many other structural flaws, such as concentrating sweeping Executive, rulemaking, and adjudicative powers in an agency immune from the Appropriations process. *See supra* at 26–29. In light of the multiple provisions of the CFPA that, taken as a whole, create an undoubtedly unconstitutional agency, rewriting the statute to solve all of these

problems would take the Court far beyond the appropriate judicial role. *Free Enter. Fund*, 561 U.S. at 510. Accordingly, the proper remedy is to strike down the CFPB as a whole.

Further, this Court cannot sever the removal provision without transforming the CFPB into an entity that Congress never intended. Severability turns on whether "the statute will function in a manner consistent with the intent of Congress," or whether it will result in "legislation that Congress would not have enacted." *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted). Here, Congress sought to create an agency "completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority." 156 Cong. Rec. H5239 (2010) (Rep. Maloney). Congress's willingness to insulate the agency from congressional control was plainly conjoined with the desire to insulate it from presidential control as well. But the fact that Congress *intended* to create a single-Director independent agency with plenary governmental powers does not make such an entity constitutional.

It is doubtful that Congress would have granted the President increased power over 19 federal consumer-protection statutes—several of which were previously administered exclusively by independent agencies—while at the same time giving up its own appropriations and oversight powers. "Some delegations of power to the Executive or to an independent agency may have been so

controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Alaska Airlines*, 480 U.S. at 685. Here, severing only the for-cause removal provision would fundamentally "alter[] the balance of powers between the Legislative and Executive Branches" in a manner that Congress likely did not intend. *Ibid*.

To be sure, Dodd-Frank's severability clause makes clear that Congress would have wanted the provisions of Dodd-Frank that are *unrelated* to the CFPB to survive the agency's invalidation. That clause, however, says little about whether Congress would have wanted a CFPB with a Director removable at will by the President. All of the provisions that make the Director unaccountable are central to the CFPB's structure. Picking and choosing which ones to keep would not fix an existing agency, but create a new one.

II. This Court Cannot Avoid Addressing The Constitutionality Of The CFPB's Structure Unless It Vacates Without Remanding.

Although the panel's plainly correct statutory rulings should be reinstated by the full Court, such action would not allow the Court to "avoid" the constitutional question unless it simply vacates the Director's order. For at least three reasons, any remand would be inappropriate unless this Court first decides the legitimacy of the agency to which it is remitting the case. *See* Panel Op. 10–11 n.1. *First*, any statutory holding resulting in a remand would be an inadequate basis for decision, because this Court cannot remand to an unconstitutional agency. To grant the full

relief Petitioners are requesting, the Court would need to vacate the order *without* remanding, so that the CFPB cannot resume proceedings against PHH. *Second*, the constitutional violation is one that cannot be cured by any remand, in part because any new charges would be time-barred. *Third*, remand would be futile because it would only postpone the ultimate resolution of the CFPB's constitutionality and exacerbate the violation of Petitioners' constitutional rights in the meantime.

1. As the panel explained, resolution of the separation-of-powers issue in PHH's favor (on the merits and with respect to remedy) would pretermit the need for any remand, whereas the panel determined that the statutory ruling required a remand to the CFPB. Panel Op. 10–11 n.1.

A remand is a transfer of jurisdiction from one tribunal to another under the assumption that the receiving tribunal will take "some further action." *Black's Law Dictionary* 1484 (10th ed. 2014). The receiving tribunal must be capable of exercising that jurisdiction for the remand to be effective. *See SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947) (an agency on remand is "bound to deal with the problem afresh, performing the function delegated to it by Congress"). Here, however, the CFPB *cannot* perform that function because its structure violates the Constitution. Just as the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* affirmed *dismissal* of a suit that the bankruptcy courts could not constitutionally hear, 458 U.S. 50, 57, 88–89 (1982), this Court cannot

remand this case to an entity with structural constitutional defects unless and until those defects have been remedied.

Indeed, the unconstitutionally structured CFPB "had no authority to bring an enforcement action" against PHH in the first place, *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706–07 (D.C. Cir. 1996), and hence the proceedings were unlawful *ab initio*. Thus, the CFPB's unconstitutional structure taints everything it has done in this case, beginning with the threshold decision to file a Notice of Charges. A CFPB enforcement action "is commenced by" a Notice of Charges, 12 C.F.R. § 1081.200(a), brought by CFPB enforcement counsel, who serve under the Director, 12 U.S.C. § 5492(a), and possess only the power that the Director has delegated to them, *id.* § 5493. Where, as here, an agency's actions are "taint[ed]" by a structural constitutional violation, they are automatically invalid. *See Landry v. FDIC*, 204 F.3d 1125, 1131–32 (D.C. Cir. 2000). All of the CFPB's proceedings in this case—not just the Director's final Order—are therefore invalid. *See SW Gen., Inc. v. NLRB*, 796 F.3d 67, 80 (D.C. Cir. 2015) (vacating NLRB order without remanding because the court could not "be confident that the complaint against Southwest would have issued" under a properly appointed General Counsel), *certiorari granted on other grounds*, No. 15-1251 (U.S. 2016). And, without a valid Notice of Charges, there is no lawful enforcement proceeding to remand.

Judge Henderson, in her panel concurrence, expressed the view that the separation-of-powers question could be avoided because PHH requested "vacatur," and the panel majority concluded that "vacatur is warranted on statutory grounds." Op. of Henderson, J., at 2–3. That is true as far as it goes, but PHH never sought the remedy that the panel ordered—vacatur *and remand*. PHH sought an *end* to these proceedings. Indeed, in its Petition for Review, PHH expressly asked this Court to "hold unlawful, vacate, enjoin, terminate, and set aside the Decision and Order," Pet. for Review at 3 (June 19, 2015), Doc. 1559308—relief that would have precluded any remand. The CFPB understood that granting Petitioners' requested relief would rule out a remand, and therefore specifically requested that the panel not "vacate" the Director's decision in the event Petitioners prevailed on the RESPA issues, but instead "reverse and remand the matter to the Bureau for further proceedings." Br. of Resp. CFPB 61 n.50, Doc. 1586892. The only way this Court could properly avoid deciding the separation-of-powers question is by granting PHH *all* the relief it seeks—vacating the CFPB's Order *without* a remand, so that the CFPB may not resume proceedings against PHH.

2. Even if a ruling invalidating an agency's structure might sometimes result in a remand, here there are additional reasons why a remand to allow the CFPB to ratify its earlier, invalid actions would be neither necessary nor proper. First, because the entire proceeding was infected by the separation-of-powers

violation, any "ratification" would require a validly appointed Director to issue a new Notice of Charges. That would commence a new proceeding, so there is no need to remand the invalid one.

Second, ratification is now impossible in any event. An invalid decision cannot be ratified unless the ratifying official still has the authority "to do the act ratified . . . *at the time the ratification [i]s made*." *See FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (internal quotation marks omitted). In *NRA*, ratification was ineffective because it came after the relevant action (filing a petition for certiorari) was time-barred. This Court further confirmed in *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), that ratification must be *timely* ratification. *Doolin* involved an enforcement action that an invalidly appointed director initiated and a validly appointed director later ratified. This Court approved the ratification only because "[t]he timing problem posed in *NRA* is not present here," and "[n]o statute of limitations would have barred" the validly appointed director "from reissuing the Notice of Charges himself and starting the administrative proceedings over again." *Id.* at 212–13; *see also NRA Political Victory Fund*, 513 U.S. at 98–99 (citing *Town of Nasewaupee v. City of Sturgeon Bay*, 251 N.W.2d 845, 848–49 (Wis. 1977), and describing that case as a "refus[al] to uphold town board's ratification

of private attorney's unauthorized commencement of lawsuit where ratification came after the statute of limitations had run").

This doctrine is dispositive here. The Notice of Charges does not allege any illegal acts taken after May 2013 (as all of Petitioners' reinsurance arrangements had ended by that point). JA58. As the panel held and as demonstrated below, *see infra* at 45–46, the CFPB's enforcement action against Petitioners is subject to a three-year limitations period. That limitations period would not be tolled during the pendency of the administrative proceedings against PHH brought by an unconstitutionally structured agency. *See NRA Political Victory Fund*, 513 U.S. at 98–99 (time for petitioning for writ of certiorari ran during pendency of FEC's invalid certiorari petition); *cf. Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604 (3d Cir. 2016); *Doolin*, 139 F.3d at 213. Thus, there is no way even a constitutional CFPB Director could ratify this Notice of Charges. It would therefore be useless for this Court to sever the Director's removal restrictions for the purpose of remanding to the CFPB for further proceedings.[6]

[6] Nor would a remand become proper if this Court were to hold the CFPB's structure unconstitutional but sever only the for-cause provision, *contra* Section I. In addition to the points discussed above, the Senate has not confirmed and the President has not appointed a nominee to the new office that this Court would be creating, and hence no constitutionally legitimate Director is available to take any action on remand. After this Court severed a for-cause limitation on the removal of Copyright Royalty Judges, the Court recognized that the judges' previous

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3. Furthermore, a remand without any answer to the constitutional question would be "futile." *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992). That approach would just leave these important questions unanswered and force PHH to continue to litigate them in any future stage of this matter. It would also exacerbate the violation of Petitioners' constitutional rights in the interim. A remand therefore "would serve no useful purpose," *Guardian Moving & Storage Co. v. ICC*, 952 F.2d 1428, 1433 (D.C. Cir. 1992) (internal quotation marks omitted), and "would be an empty gesture," *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1066 (D.C. Cir. 1992). The Court should decide the separation-of-powers issues now, and hold in this appeal that the Director's unprecedented powers and independence violate the Constitution.

III. If This Court Concludes That The ALJ Was An Improperly Appointed Inferior Officer, That Holding Would Not Entirely Dispose Of This Case.

Aggravating the constitutional problems here, the ALJ who presided over the hearing, despite being an "inferior Office[r]," was not appointed by the

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appointments were invalid, that their decisions had to be vacated, and that new judges had to be appointed—this time, to serve at the pleasure of the appointing authority. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 116, 122 (D.C. Cir. 2015). And here, a new appointment must be made by the President with the Senate's advice and consent, whereas the Librarian of Congress could quickly appoint new Copyright Royalty Judges unilaterally.

President, a court, or a "Hea[d] of Departmen[t]." U.S. Const. art. II, § 2, cl. 2. This enforcement action was assigned to the ALJ by the SEC's Chief ALJ, JA75, who also originally appointed him, *see Bandimere v. SEC*, 844 F.3d 1168, 1177 (10th Cir. 2016). But the SEC's Chief ALJ is not a "Head[]" of a "Department[]." Yet SEC ALJs are inferior officers because, even though they cannot enter final orders, they "perform more than ministerial tasks"; for instance, they "take testimony," "conduct trials," and "rule on the admissibility of evidence." *Freytag*, 501 U.S. at 881–82. Therefore, the entire hearing before the ALJ was invalid. *See* Op. of Randolph, J., at 1.

If this Court concludes that the ALJ below was improperly appointed, then it must vacate not only the Director's Order and Decision for the reasons discussed above, but the entirety of the ALJ's proceeding as well. Petitioners are "entitled to a hearing before a properly appointed" ALJ. *Ryder v. United States*, 515 U.S. 177, 188 (1995). A violation of the Appointments Clause is a "structural" defect that taints the entire proceeding and "invalidate[s] a resulting order," even when an ALJ's "purely recommendatory power" is followed by "de novo review." *Landry*, 204 F.3d at 1130–32 (internal quotation marks omitted). To remedy the Appointments Clause violation, therefore, any future proceedings must begin afresh not only before a constitutionally structured agency but also before a valid adjudicator.

But merely restarting the current proceeding still would not provide PHH with full relief. As discussed above, *supra* at 32–33, the filing of a Notice of Charges against PHH was *itself* tainted by the agency's structural defects. JA41. Thus, even if the CFPB were to begin proceedings afresh before a properly appointed ALJ, the unconstitutional taint stemming from the initial authorization of the Notice of Charges would continue to infect the matter. For this reason, the Court must decide PHH's separation-of-powers challenge even if the ALJ was improperly appointed.

IV. The Panel Correctly Rejected The Director's Erroneous Interpretations Of RESPA.

The panel correctly and unanimously determined that the Director's novel interpretation of Section 8 of RESPA cannot stand, and the Court's order granting rehearing directed the parties to treat the "panel's ruling on the statutory issues in this case" as "given." Order at 2 (Feb. 16, 2017), Doc. 1661681. Indeed, the CFPB did not even mention several of those issues in its rehearing petition. Although the CFPB did seek rehearing on the panel's interpretation of Section 8(c)(2), the United States did not support that request—and for good reason: Those statutory issues plainly were not en banc-worthy, and the Director's interpretation of RESPA, if adopted by this Court, would create a circuit split with every other court to have considered RESPA's proper scope.

These issues should not properly be disputed before this en banc Court, and any en banc opinion should simply reinstate the panel's statutory rulings. *See*, *e.g.*, *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc). In an abundance of caution and in light of the critical importance of the RESPA issues to PHH and to the entire settlement-services industry, however, PHH addresses those issues directly to demonstrate that there is no legitimate basis to revisit the panel's statutory rulings.

A. Reasonable Payments For Services Or Goods Actually Provided Do Not Violate RESPA.

Section 8 generally prohibits giving or accepting "any fee, kickback, or thing of value pursuant to any agreement" to refer real-estate settlement-service business. 12 U.S.C. § 2607(a). Section 8(c), however, makes clear that "certain conduct or transactions . . . do not violate the statute," *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525, 529 (7th Cir. 2012), stating that "[n]othing in this section shall be construed" to prohibit "the payment to any person of a bona fide salary or compensation or other payment for goods or services actually performed." 12 U.S.C. § 2607(c)(2).

"Nothing means nothing." Panel Op. 73. Section 8(c)(2) unambiguously states that reasonable—*i.e.*, "bona fide"—payments for services actually provided do not violate RESPA. Thus, "[t]he basic statutory question in this case is not a close call." *Ibid.* "Reasonable payments in return for services actually performed

or goods actually furnished [we]re not intended to be prohibited," which is why Congress included Section 8(c)(2). S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551. If a payment is reasonably related to the value of services actually provided, then the payment does not violate RESPA. Panel Op. 74. This is fully consistent with the purpose of the referral-fee prohibition: to address "unnecessarily high settlement charges caused by certain abusive practices." *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1038 (D.C. Cir. 1986).

Every court of appeals to reach the question has concluded that "reasonable payments for goods, facilities or services actually furnished are *not prohibited* by RESPA, even when done in connection with [a] referral." *Glover v. Standard Fed. Bank*, 283 F.3d 953, 964 (8th Cir. 2002); *accord O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 739–41 (5th Cir. 2003); *Howland*, 672 F.3d at 533; *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003). This interpretation is consistent with decades of guidance from HUD and other agencies, *see supra* at 7–10, and is identical to the interpretation in the CFPB's *own regulations*, which make referrals lawfully "compensable" so long as the compensation takes the form of payments that bear a "reasonable relationship to the market value of the goods or services provided." 12 C.F.R. § 1024.14(b), (g)(2); Panel Op. 76. And the same interpretation appears in official HUD policy statements that CFPB has expressly

adopted. *See supra* at 9 (collecting HUD statements applying the two-part test); 76 Fed. Reg. at 43,570 (CFPB adopting HUD's "official commentary, guidance, and policy statements").

Brushing all this authority aside, the Director announced that Section 8(c)(2) is "not relevant" here. JA17. According to the Director, Section 8(c)(2) merely "provid[es] direction" on how to interpret Section 8(a), "but does not provide a substantive exemption from section 8(a)." JA16. That interpretation ignores the plain text and makes no sense. The phrase "nothing in this section shall be construed as prohibiting," 12 U.S.C. § 2607(c), unambiguously states that none of the payments listed in Section 8(c) violates RESPA, even if—indeed *because*—it would otherwise fall within Section 8(a)'s or 8(b)'s prohibitions. Section 8(c)(3), for example, permits "payments pursuant to" certain "referral arrangements," 12 U.S.C. § 2607(c)(3), which would obviously violate Section 8(a) but for Section 8(c). The Director's interpretation of Section 8 to prohibit what the statute plainly allows "effectively writes Section 8(c) out of RESPA," turning Section 8's "interrelated sections upside down" by "putting total emphasis on the prohibitory language of Section 8(a) and no emphasis on the permissive language of Section 8(c)." *Glover*, 283 F.3d at 964.

The Director further argued that the reinsurance premiums were not protected by Section 8(c)(2) because they were not "bona fide," which the Director

thought "refers to the purpose of the payment, not its amount." JA17. But "bona fide" modifies (at most) "salary or compensation or other payment." 12 U.S.C. § 2607(c)(2). Assuming *arguendo* that "bona fide" modifies all three nouns in that phrase, the *payment* must be bona fide, not the buyer's motives for making that payment in exchange for goods or services. A payment is "bona fide" if it bears a reasonable relationship to the value of the services actually provided in return. That is the objective test that RESPA has always embodied. Under the Director's version of Section 8, "inventive minds making clever arguments can turn virtually *any* payment" into a "payment for the unlawful referral of business." *Glover*, 283 F.3d at 964. Section 8(c)(2) forecloses those arguments because it "clearly states that reasonable payments for goods, facilities, or services actually furnished are not prohibited by RESPA, even when done in connection with [a] referral." *Ibid.*

The Director contended that his interpretation was necessary to further "the goal of section 8," which the Director perceived as a total ban on anything that could be characterized as "compensated referrals." JA16. But as shown above, that perception contravenes the statute's text and purpose. Section 8(c)'s exemptions make crystal-clear that the prohibitions of Section 8(a) are limited. And, in any event, "[v]ague notions of statutory purpose provide no warrant for

expanding" Section 8 "beyond the field to which it is unambiguously limited." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012).[7]

Congress decided that reasonable payments for services actually provided are *not* illegal referral fees. Whether the Director agrees with that judgment or not, he has no authority to rewrite the statute.[8]

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[7] The CFPB did not seek rehearing on the panel's further holding that the CFPB bears the burden to prove that PHH's reinsurance agreements are not protected by Section 8(c)(2). *See* Panel Op. 89 n.26. The Director flipped the burden of proof when he concluded in the alternative that Petitioners' reinsurance arrangements did not comply with Section 8(c), JA20, but the CFPB has since abandoned that position, *see* Stay Opp. 14 n.5.

[8] Even if RESPA were unclear—and it is not—the Director's interpretation would be entitled to no deference. Since Section 8 has criminal applications, the rule of lenity resolves any ambiguity in PHH's favor. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); *see also Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730–31 (6th Cir. 2013) (Sutton, J., concurring). Moreover, because the Director reversed course and "reject[ed]" HUD's long-standing interpretation, JA17, with "barely any explanation" or acknowledgement of "the significant reliance interests involved," his interpretation "does not receive *Chevron* deference." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *see* JA19 (Director dismissing the industry's reliance interests as "not particularly germane"). The Director also failed even to acknowledge the plain text of Regulation X, 12 C.F.R. § 1024.14(b), (g)(2), let alone explain how his decision could possibly be reconciled with it. That too was error: "It is axiomatic that an agency must adhere to its own regulations." *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986).

B. RESPA's Three-Year Limitations Period Applies To This Proceeding.

The Director expanded his sweeping constructions of Section 8 even further by concluding that the CFPB's administrative enforcement actions are unbound by any statute of limitations. The panel correctly rejected that conclusion, noting the "absurdity" of the CFPB's argument that it may "bring[] an administrative enforcement action 100 years after the allegedly unlawful conduct," with nothing to prevent such inequity but the agency's own prosecutorial discretion. *See* Panel Op. 100. The CFPB did not challenge the panel's statute-of-limitations holding in its en banc petition.

Section 16 of RESPA provides that "[a]ny action" by the CFPB "may be brought within 3 years from the date of the occurrence of the violation." 12 U.S.C. § 2614. The Director reasoned that the word "action" refers exclusively to actions in court, and therefore that the limitations period is inapplicable to administrative proceedings. JA10–12. That was wrong for several reasons.

As an initial matter, the word "action" can encompass both judicial "actions" and administrative enforcement "actions," as it does repeatedly in the CFPA itself. *See* Panel Op. 95–96 (collecting examples). The Supreme Court's interpretation of "action" to mean "judicial action" in *BP America Production Co. v. Burton* turned on other textual clues in the statute, including the word "complaint" and the phrase "money damages." 549 U.S. 84, 91–92 (2006). Here, the textual clues point the

other way. Panel Op. 94–95. The one-year limitations period for private lawsuits applies to "[a]ny action" brought in a "court," but the three-year limitations period for enforcement "action[s]" is not restricted to "court" proceedings. 12 U.S.C. § 2614.

Moreover, the statutory provision governing administrative proceedings says that the CFPB may use such proceedings "unless such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding." 12 U.S.C. § 5563(a)(2). "Obviously, one such 'limit' is a statute of *limitations*." Panel Op. 93.

"Given the reasons why we have statutes of limitations, there is no discernible rationale for applying" RESPA's statute of limitations when an enforcement action "is brought in a court, but not when it is brought in an administrative agency." *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994). The "basic policies of all limitations provisions" require "a fixed date when exposure to the specified Government enforcement efforts ends." *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013). Under the Director's interpretation of 12 U.S.C. § 2614, however, there would never be a "fixed date" at which "exposure to" CFPB enforcement would end.

C. If Any Violations Occurred, They Occurred At Closing.

The Director also ignored RESPA's unambiguous text by concluding that each monthly reinsurance premium payment constituted a separate statutory violation. Section 8(a) prohibits "giv[ing]" or "accept[ing]" a "fee, kickback, or thing of value" pursuant to an agreement for a referral. 12 U.S.C. § 2607(a). Thus, although the panel chose not to address the question in light of the Director's numerous other errors, Panel Op. 100 n.30, the Director's interpretation of Section 8(a) was also manifestly erroneous because a Section 8(a) violation can occur only at the point when a provider agrees to and makes the referral in exchange for the "fee, kickback, or thing of value." The fact that the payment allegedly given for that referral is provided later, or over time, does not give rise to a new actionable agreement to refer business—the business has already been referred, and a thing of value has already been exchanged for the alleged referral. Therefore, such payments, which are not tied to a new referral, are not separate violations.

In the context of a purportedly unlawful mortgage-reinsurance arrangement, the agreement is that the affiliate will reinsure a portion of any covered loss after the loan closes and the "thing of value" is the contractual right to a future stream of mortgage reinsurance premiums in exchange for reinsuring the loan. There is only one referral of a borrower to a mortgage insurer. The mortgage insurer will provide mortgage insurance on the borrower's loan for as long as it is required.

That referral occurs prior to closing. A mortgage reinsurer "accept[s]" both the obligation to reinsure and the contractual right to premiums on the day a loan closes. That the actual money changes hands in a series of monthly installment payments, instead of as a lump sum on the closing date, makes no difference. Under the Director's interpretation, however, the referral of a single loan could result in hundreds of "kickbacks" over a period of decades.

The Director's interpretation also has a profound effect on RESPA's limitations rules, including the one-year period for private suits, which runs from "the date of the occurrence of the violation." 12 U.S.C. § 2614. When a court must choose between two interpretations of a statute, one of which has the effect of dramatically extending the limitations period, the court should pick the other. *McGoff*, 831 F.2d at 1094. Here, under the Director's interpretation, each monthly reinsurance premium payment triggers a new limitations period, allowing potential plaintiffs to sit on their rights for *decades*. This case vividly illustrates the potential for mischief: The Director used his new definition of a RESPA violation to massively expand the universe of alleged violations that were still within the limitations period, allowing him to increase the disgorgement amount by a factor of 18—from $6 million (as the ALJ found when applying the correct interpretation of Section 8(a)) to $109 million.

That decision was unprecedented. As numerous courts have recognized, a RESPA violation occurs when a loan closes, not at each later date when a defendant receives an installment payment. *See*, *e.g.*, *Cunningham v. M & T Bank Corp.*, 814 F.3d 156, 160 (3d Cir. 2016); *Mullinax v. Radian Guar. Corp.*, 199 F. Supp. 2d 311, 325 (M.D.N.C. 2002). The Fifth Circuit, for instance, held that when a provider received a referral at closing but the purported economic benefits came over a longer period afterwards, the Section 8 violation occurred "at closing," reasoning that a contrary interpretation "would let the statute of limitations regenerate itself like a phoenix from the ashes." *Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 360 (5th Cir. 2003). Here, too, if this Court addresses the question, it should conclude that any purported RESPA violations occurred at closing.[9]

[9] The panel did not address the CFPB's sanctions—save for clarifying that any disgorgement must be reduced by the value of the reinsurance, Panel Op. 79 n.24; *see United States v. Masters*, 924 F.2d 1362, 1369–70 (7th Cir. 1991)—and the CFPB never has suggested that this issue should be considered by the full Court. But those sanctions are invalid. The Order's staggeringly broad injunctions cover activities far beyond the conduct addressed in the Notice of Charges. *See SEC v. Wash. Inv. Network*, 475 F.3d 392, 407 (D.C. Cir. 2007). Moreover, the CFPB has no statutory authority to order disgorgement. *See* 12 U.S.C. § 2607(d).

V. The Director's Decision Violates Fundamental Principles Of Fair Notice.

The Director's determination rests on radical new interpretations of Sections 8(a) and 8(c) that cannot, consistent with fundamental principles of fair notice, be applied retroactively to punish Petitioners for conduct taken in reliance on prior agency precedent. Thus, the panel's fair-notice holding was plainly correct, and the CFPB itself conceded that the issue is not independently en banc-worthy. Pet. 14–15.

In the specific context of mortgage reinsurance, HUD told regulated parties—*twice*—that affiliated-reinsurance agreements are permissible so long as lenders actually provide reinsurance and the compensation "does not exceed the value of the reinsurance." JA257; *see* JA259. The Director blithely "reject[ed]" HUD's long-standing guidance, asserted that PHH's reliance on it was "not particularly germane," and then imposed more than a hundred million dollars in retroactive liability based on his new interpretation of RESPA. JA17–19, JA40. As the panel put it, that fails "Rule of Law 101." Panel Op. 86.

The Due Process Clause prevents the government from retroactively imposing liability without giving "fair notice of conduct that is forbidden." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). This "bedrock principle of American law," *Carter*, 736 F.3d at 727, "preclude[s] an agency from penalizing a private party for violating a rule without first providing adequate

notice of the substance of the rule," *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). Fair notice depends on whether, "'by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.'" *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (citation omitted).

Accordingly, "in a sentence that all but decides th[is] case," Panel Op. 85, the Supreme Court has made clear that "an agency should not change an interpretation in an adjudicative proceeding where doing so would impose 'new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements' or in a case involving 'fines or damages.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (quoting *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 295 (1974)); *see Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (*Bell Aerospace* prevents agencies from announcing new policies in adjudication "in a case of severe impact and justifiable reliance on contrary agency pronouncements") (internal quotation marks omitted); *see also Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1088 (D.C. Cir. 2007). This "fair notice" requirement is particularly critical for statutes, such as Section 8, that impose criminal as well as civil liability. *See Carter*, 736 F.3d at 727.

The CFPB violated this basic constitutional requirement by imposing massive, nine-figure liability on PHH based on two radical new interpretations of RESPA that abruptly "reject" (JA17) almost two decades of agency and judicial interpretation and application, retroactively sanctioning Petitioners for arrangements that HUD had expressly blessed. The Director's interpretations of RESPA cannot be retroactively applied to Petitioners.

A. The Director's New Interpretation Of Section 8(c)(2) Contradicts Nearly Two Decades Of Consistent Agency Guidance.

For decades, all of HUD's "regulations and other public statements issued by the agency," *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), instructed Petitioners that Section 8 of RESPA permitted affiliated reinsurance so long as it was (1) for reasonable compensation, and (2) for services actually performed, even if referrals were somehow involved. Regulation X, promulgated by HUD and expressly adopted by the CFPB, says the same thing. *See supra* at 41.

Applying that two-part test, the HUD Secretary's designee stated in the HUD Letter that affiliated-reinsurance arrangements are permissible under RESPA if the payments "(1) are for reinsurance services 'actually furnished or for services performed' and (2) are *bona fide* compensation that does not exceed the value of such services." JA253. HUD (and other agencies) repeatedly held to that legal interpretation. *See* JA259; *see also supra* at 7–10 (collecting examples).

HUD's interpretation of Section 8 as applied to reinsurance arrangements was universally understood to be the governing standard. A leading RESPA treatise observed:

> HUD concluded (and there is no reason to think the CFPB does not agree) that captive mortgage reinsurance arrangements are permissible under RESPA if the payments to the reinsurer: (1) are for reinsurance services actually furnished or for services performed and (2) are bona fide compensation that does not exceed the value of such services.

James H. Pannabecker & David Stemler, *The RESPA Manual: A Complete Guide to the Real Estate Settlement Procedures Act* § 8.04[6][a] (2013) (citation omitted). Courts, too, have relied on HUD's two-part test to determine the legality of affiliated-reinsurance arrangements under RESPA. *See* JA86.

Indeed, *in this very proceeding*, the ALJ relied on the HUD Letter, explaining that its "'guidance is a straightforward application of [Regulation X] to captive reinsurance,'" and it "has been 'relied upon by mortgage insurers, lender-owned reinsurers and courts alike to evaluate a captive arrangement's compliance with Section 8.'" JA147 (citation omitted).

Upending this well-settled interpretation of Section 8(c), the Director concluded that affiliated reinsurance violates Section 8(a) even when the reinsurance coverage was provided at a "commensurate price." JA20. The CFPB's Order thus punishes the precise activity that HUD had told regulated entities (including Petitioners) was legal.

The Director dismissed the HUD Letter as not "binding," JA17, but whether the letter qualified for a *statutory* safe harbor is beside the point. The *Constitution* protects against agencies' attempts to change a legal interpretation and punish regulated parties who relied on the old interpretation. And there can be no dispute that the HUD Letter reflected the agency's authoritative position. First, the CFPB's own regulations and voluminous *other* published guidance from HUD contain the *same* two-part test as the HUD Letter and expressly "permit" qualifying payments. *See* 12 C.F.R. § 1024.14(g)(2); *supra* at 7–10.

Second, even if the HUD Letter had been the *only* place HUD set out its official legal interpretation, the Director still could not brush it aside. Agency pronouncements far less formal than this can deprive regulated parties of fair notice. *See*, *e.g.*, *Gen. Elec.*, 53 F.3d at 1332 (informal letter from "one EPA regional office"); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1356 (D.C. Cir. 1998) (NHTSA's internal test schematic). HUD plainly intended its letter ruling to provide guidance to regulated entities and to govern RESPA's application to them. It was written by the HUD official who exercised the Secretary's delegated authority to enforce RESPA. 54 Fed. Reg. at 22,033. It "detail[ed]" "how [HUD] will scrutinize these arrangements to determine whether any specific captive reinsurance program is permissible under RESPA," and concluded by reassuring Countrywide that "this guidance will assist you to conduct your business in

accordance with RESPA." JA251, JA258. HUD later reiterated that its "1997 guidance" would be "useful" in "evaluat[ing]" the "legality of captive mortgage reinsurance agreements under RESPA." JA259. And, on its first day of existence, the CFPB confirmed that all "official commentary, guidance, and policy statements" from HUD would continue to control "pending further CFPB action." 76 Fed. Reg. at 43,570. Until the Director's Decision, the CFPB took no administrative action suggesting that the HUD Letter no longer represented the government's position.

It thus was impossible for Petitioners to have "identif[ied]" at the time of the challenged conduct, let alone with the requisite "ascertainable certainty," "the standards with which the [CFPB now] expects parties to conform." *Gen. Elec.*, 53 F.3d at 1329. Petitioners could not have predicted that the Director would jettison HUD's well-settled interpretation of RESPA years after Atrium paid out millions in claims under its reinsurance arrangements. Even *silent agency acquiescence* can preclude fair notice. *See Christopher*, 132 S. Ct. at 2168. This case is even worse: What the CFPB now says was forbidden was affirmatively *permitted* by the "regulations and other public statements issued by [HUD]," *Gen. Elec.*, 53 F.3d at 1329. Where, as here, "there is a substitution of new law for old law that was reasonably clear," *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (internal quotation omitted), an agency cannot impose "'new liability'" for "'past

actions which were taken in good-faith reliance on agency pronouncements,'" *Clark-Cowlitz*, 826 F.2d at 1084–85 (citation and alterations omitted). The Director's attempt to manufacture retroactive liability against those who took the government at its word violates the bedrock requirements of due process.

B. The Director's New Interpretation Of How To Apply RESPA's Limitations Period Contradicts The Previously Settled Interpretation.

Petitioners also lacked fair notice of the Director's surprising new interpretation of Section 8(a) as creating a violation every time a reinsurance premium is received, rather than when the relevant loan closed.

The Director's interpretation was literally unprecedented. As the ALJ acknowledged, JA91, courts have consistently found that a RESPA violation occurs (if at all) when the loan closes. *See*, *e.g.*, *Snow*, 332 F.3d at 359–60; *supra* at 49 (collecting cases). No court has disagreed. JA91. As the ALJ correctly recognized, "the *Snow* doctrine is authoritative." JA92. Regulated entities may reasonably rely on settled judicial statutory constructions even when an agency has not expressly agreed with those decisions. *De Niz Robles*, 803 F.3d at 1177–79; *cf.* *Christopher*, 132 S. Ct. at 2167–68. That is precisely what Petitioners (and numerous other companies) did.

The Director's new theory of Section 8(a)—that one improper referral can subsequently generate hundreds of separate violations—allowed him to reach back

in time to loans that closed years ago, even before July 21, 2008. This had the undeniably colossal effect of increasing Petitioners' liability by more than $100 million. Due process prevents the Director from punishing Petitioners for receiving payments that were not previously considered independently actionable under RESPA.

* * *

An agency cannot "punish a member of the regulated class for reasonably interpreting [its precedent]. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'" *Satellite Broad. Co.*, 824 F.2d at 4. As the panel held, the CFPB's attempt to apply its newfound interpretations to PHH in this case, retroactively, failed "Rule of Law 101." Panel Op. 86–89. The Director may wish to rewrite RESPA, but he cannot rewrite history: HUD, other federal agencies, industry, courts, commentators, and the ALJ *all* read Section 8 to make lawful what the Director now seeks to punish. Due process does not permit that outcome.

CONCLUSION

The Decision and Order should be vacated without remand, and this Court should forbid the CFPB from resuming proceedings against Petitioners.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 10, 2017, an electronic copy of the foregoing Brief for Petitioners was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon the following counsel for respondent Consumer Financial Protection Bureau, who is a registered CM/ECF user:

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